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No. 04-563

IN THE SUPREME COURT OF THE UNITED STATES

DENEICE A. MAYLE, Warden,

Petitioner,

v.

JACOBY LEE FELIX

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether two habeas claims arise from the same "conduct, transaction, or occurrence" under Federal Rule of Civil Procedure 15(c) when both claims challenge the same trial and conviction on the ground that the trial judge admitted into evidence extrajudicial statements in violation of the Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals is reported at 379 F.3d 612. J.A. 5. The order of the district court, Pet. App. B, and the findings and recommendations of the magistrate judge, Pet. Apps. C & D, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2004. The petition for a writ of certiorari was filed on October 25, 2004, and granted on January 7, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Section 2244(d)(1), Title 28, United States Code, provides, in pertinent part, that:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court . . . run[ning] from . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

Section 2242, Title 28, United States Code, provides, in pertinent part, that an "[a]pplication for a writ of habeas corpus . . . may be amended or supplemented as provided in the rules of procedure applicable to civil actions."

Section 2266(b)(3)(b), Title 28, United States Code, relating to habeas corpus procedures in certain capital cases, provides that:

> No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

Section 2244(b)(2), Title 28, United States Code, provides that:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Rule 15 of the Federal Rules of Civil Procedure (hereafter "Civil Rule 15") provides, in pertinent part:

> (a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . .. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires...
>
> . . . .
>
> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set

forth in the original pleading.[1]

Civil Rule 81(a)(2) provides, in pertinent part, that the Civil Rules

> are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions.

Habeas Rule 4 provides, in pertinent part, that "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner."

Habeas Rule 11 provides, in pertinent part, that the Civil Rules "to the extent they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules."

STATEMENT OF THE CASE

1. During the course of a murder investigation, a detective from the Sacramento Police Department took two jailhouse statements, one from Mr. Felix and the other from Kenneth Williams. Pet. App. C8, C20. During Mr. Felix's trial in state court, the two statements were admitted over Mr.

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1. References to the Federal Rules of Civil Procedure will be made as "Civil Rule __", and to the Rules Governing Section 2254 Cases as "Habeas Rule __."

Felix's objections during the prosecutor's case-in-chief. First, the prosecution showed a videotape of Kenneth Williams's statement after Williams was called to the stand and testified that he did not remember the statement he had given the police. RT 539. The court admitted Williams's videotaped statement over Mr. Felix's objection that it violated his right to confront the witness. RT 1217.

Second, the prosecution adduced testimony about Mr. Felix's statement during the direct examination of the investigating officer. This too was admitted over Mr. Felix's objection that the testimony violated his right to due process and his privilege against self-incrimination. CT 581-590; RT 722-732.[2]

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2. Mr. Felix had filed an in limine motion to suppress his statement on the ground that it was coerced in violation of his privilege against self-incrimination. CT 581. At the hearing on the motion, the prosecutor acknowledged that "after a certain point in the interview, there is an express or implied promise of leniency that makes the rest of the statement beyond that point inadmissible." RT 25. The court ruled that the latter part of the statement was inadmissible, but it allowed the prosecution to use the first part of the statement. CT 591; RT 46.

In fact, there is nothing materially different about the coercive and intimidating tactics the police used in the latter part of the interrogation from the tactics employed before that point. Pet. App. I8-14. At trial, the prosecutor used the statements to place Mr. Felix at the scene of the crime at the time it was committed (RT 724, 727), tie him to Kenneth Williams (RT 725), and impeach his credibility RT 1031, 1033, 1039, 1040, 1046, 1049, 1052, 1062, 1092, 1109, 1110, 1115, 1116, 1119, 1122, 1123, 1124, 1128, 1134, 1136, the primary factor on which Mr. Felix's defense hinged.

Mr. Felix was convicted and sentenced to life imprisonment without the possibility of parole. On direct appeal, the state courts rejected Mr. Felix's claim that admission of Williams's statement violated his right to confront witnesses. Pet. App. E10-13. Mr. Felix's conviction became final on August 12, 1997. Pet. App. A5.

2. On May 8, 1998, Mr. Felix filed a timely pro se application for writ of habeas corpus in the United States District Court for the Eastern District of California asserting the same Confrontation Clause claim he had raised in state court. *Ibid.* On May 29, 1998, the court appointed the Office of the Federal Defender to represent Mr. Felix. Pet. App. H2. The one-year limitation period under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (hereafter "AEDPA" or "the Act") expired on August 12, 1998. 28 U.S.C. § 2244(d)(1)(A). On September 15, 1998, following a scheduling conference, the magistrate judge permitted Mr. Felix to file an amended petition within thirty days. Pet. App. H3. On January 28, 1999, after several requests for extension of time that were unopposed by the Warden, Mr. Felix filed an amended federal petition as a matter of right under Civil Rule 15(a). Pet. App. H4-5; Pet. App. I. The amended petition included both the previously asserted Confrontation Clause claim and an additional claim that the state court had violated Mr. Felix's right to due process and his privilege against self-incrimination by admitting testimony about the coerced statements he made during the interrogation. Although the latter claim was not raised on direct appeal, Mr. Felix contended that appellate counsel was ineffective for having failed to raise it. Pet. App. A5. Mr. Felix also filed a petition for writ of habeas corpus asserting the coerced confession claim in the Supreme Court of California. Pet. App. D6.

On February 25, 1999, the Warden filed a motion to dismiss on the ground that the amended federal petition was

mixed because it contained both exhausted and unexhausted claims. Pet. App. H5. Mr. Felix filed several requests to continue the hearing on the motion, which were unopposed by the Warden and were granted by the court. Pet. App. H6, 7. On May 26, 1999, the state supreme court denied the exhaustion petition without comment or citation. Pet. App. C7; Answer, Attach. 8. The Warden thereafter withdrew her motion to dismiss and filed an answer responding on the merits to both claims of the amended petition and contending that the coerced confession claim should be dismissed as untimely. Pet. App. C8; Pet. App. H7, 8.

The district court issued an opinion ruling that the coerced confession claim did not relate back to the filing of the initial petition under Civil Rule 15(c) because it did not arise from the "same core of facts." Pet. App. D8. The court dismissed the coerced confession claim on the ground that it was time-barred by the one-year AEDPA statute of limitations. Pet. App. B2.

3. The Court of Appeals for the Ninth Circuit reversed. It held that because the claims in both the initial and amended petitions asserted that the Constitution was violated by admission of the statements at Mr. Felix's trial, both contentions arose from the same "conduct, transaction, or occurrence" as that term is used in Civil Rule 15(c). J.A. 10-11. The plain language of that rule, explained the court, should be applied literally according to its terms in habeas proceedings -- as it is in all other civil litigation. J.A. 10. The court concluded that the claims in this case fell comfortably within the rule because they asserted that the conviction was tainted by unconstitutional evidence introduced at the trial. The fact that each claim was based on a different legal theory did not mean that they arose from different "occurrences" under the rule. J.A. 11. Accordingly, the court concluded that the coerced confession claim related back to the filing of the initial application because both claims arose from "the same

transaction -- [Mr. Felix's] trial and conviction in state court." J.A. 10.

Following Judge Easterbrook's opinion for the Seventh Circuit in *Ellzey v. United States*, 324 F.3d 521 (2003), the court rejected the suggestion that for purposes of Civil Rule 15(c) a criminal trial and conviction should be parsed into a series of perhaps hundreds of individual occurrences, because that "'is not how the phrase "conduct, transaction, or occurrence" is used in civil practice.'" J.A. 11 (quoting *Ellzey*, 324 F.3d at 526). The court also rejected the Warden's argument that the claims involved different occurrences because Mr. Felix's statements were taken by the police more than three months before Williams's statements. This argument, the court explained, ignored the nature of Mr. Felix's habeas challenge: that the Constitution was violated not by the *taking* of the statements but by their *admission at trial*. It therefore refused to "look beyond the events of the trial to find the 'conduct, transaction, or occurrence' that is the subject of Felix's claims." J.A. 13.

The court dismissed the notion that its interpretation of the rule would obliterate the AEDPA's limitation period, because initial petitions would still have to be filed within the period. J.A. 12. A contrary interpretation -- one that precluded relation back of new claims -- would effectively nullify the rule in habeas proceedings because "[a] new 'claim' will nearly always rest on a legal theory, and often on a subset of facts within the larger transaction or occurrence, that differs from those underlying the claim asserted by the original pleading." J.A. 11, 12. With regard to the State's notice interest, the court held that the initial petition brought the trial and conviction to the attention of the State, which could therefore anticipate amendments challenging allegedly unconstitutional rulings at that trial. J.A. 14. Finally, it noted that any potential abuses of the relation back doctrine could be prevented through the district courts' application of Civil Rule 15(a), which requires

leave of court to file an amendment after a responsive pleading has been filed. J.A. 13.

SUMMARY OF ARGUMENT

The plain language of Civil Rule 15(c), which is applicable to habeas proceedings as provided in 28 U.S.C. § 2242, sets forth a broad test for when amended pleadings will relate back to the filing date of original pleadings. It provides that a claim will relate back when it arises from the same "conduct, transaction, or occurrence" set forth in the original pleading. The literal and usual meaning of each of these terms is expansive, and they have been so construed by the courts. This construction is consistent with the history of and the policies animating the Civil Rules in general, and Civil Rule 15(c) in particular.

Mr. Felix's coerced confession claim fits comfortably within this traditional application of Civil Rule 15(c). Both the coerced confession claim and the confrontation claim assert trial rights, and therefore the operative facts underlying both claims are that the trial court admitted the unconstitutional statements over Mr. Felix's objection during the prosecution's case-in-chief. That the statements were taken three months apart is irrelevant to the relation back issue, because Mr. Felix's constitutional rights were not violated when the statements were taken. The statements became "actionable" for habeas purposes only when they were admitted during the trial. See *Chavez v. Martinez*, 538 U.S. 760, 766 (2003); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). Accordingly, they share the same core of operative facts so that the latter claim would relate back to the filing of the initial petition even under the more restrictive test espoused by courts that have rejected the traditional test.

The circuit court's traditional application of Civil Rule 15(c) in the habeas context is consonant with the AEDPA

statute of limitations and the policy of fair notice. To prevail, the Warden must demonstrate that when Congress enacted the AEDPA it impliedly repealed 28 U.S.C. § 2242, the statute that specifically permits the amendment of pleadings "as provided in" Civil Rule 15. This she cannot do. In 28 U.S.C. § 2266(b)(3)(B), Congress addressed one of the primary concerns of the AEDPA's proponents -- the delay in federal *capital* habeas proceedings -- by severely restricting the right of petitioners from "opt-in" States who are under a sentence of death to amend their habeas petitions. The fact that Congress limited the right to amend in that particular category of cases and left unchanged Section 2242 of the Judicial Code is powerful evidence that it intended to preserve Civil Rule 15(c)'s application to habeas corpus proceedings alongside the new statute of limitations. Because the plain language of the statute requires the traditional application of Civil Rule 15(c) to habeas corpus proceedings, the Warden's policy concerns are irrelevant. District courts have ample authority, in any event, to prevent delay or abuse of the system.

ARGUMENT

This is a straightforward case involving the plain language of Civil Rule 15 and 28 U.S.C. § 2242. Civil Rule 15, expressly made applicable to habeas corpus proceedings by Section 2242, allows the liberal amendment of pleadings and provides that claims added to pleadings relate back to the original date of filing when they arise from the same "conduct, transaction, or occurrence." This phrase readily covers the claim added by Mr. Felix's amended habeas petition. The Warden's policy argument that the AEDPA has somehow worked an implied repeal of this controlling law should be rejected, and the court of appeals' judgment affirmed.

I.

The Facts of this Case Fit Comfortably Within the Plain Language of Civil Rule 15(c) and the Rule's Traditional Application in All Civil Contexts.

Traditionally, courts have applied Civil Rule 15 in a broad manner, consistent with its plain language, its history, and the policies behind that rule and the civil rules in general. It is against this backdrop that the Court must view Congress's enactment of the AEDPA and its new one-year statute of limitations on habeas actions. See *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) (when construing statute, "[i]t is always appropriate to assume that our elected representatives . . . know the law"). Mr. Felix's two claims, challenging the trial court's admission of unconstitutional evidence during the prosecution's case-in-chief, arise from the same "conduct, transaction, or occurrence," as that term is traditionally applied, because they both emanated from the same state-court trial. Accordingly, the coerced confession claim relates back to the date of filing of initial application.

A. The "conduct, transaction, or occurrence" test is a broad one as evidenced by the rule's plain language, its history, and the policies animating it.

When Congress adopted Civil Rule 15(c), it spoke broadly. The rule provides, in pertinent part, that "[a]n amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." The test for relation back is stated in the disjunctive, so that a claim arising from either the same conduct, or the same transaction, or the same occurrence as the

claim either set forth or attempted to be set forth in the original pleading will meet the test. *Federal Deposit Ins. Corp. v. Bennett*, 898 F.2d 477, 479 (CA5 1990).

The plain, usual, and literal meaning of the terms is expansive, as one of the Warden's *amici* acknowledges. See Br. of the States 10 ("the flexible word 'occurrence' can be broadly construed to include a criminal trial"). "Conduct" is defined simply as "[p]ersonal behavior; deportment; mode of action; any positive or negative act." *Black's Law Dictionary* at 367 (4th ed. 1951).[2] "Occurrence" is defined as "[a] coming or happening; any incident or event, especially one that happens without being designed or expected." *Id.* at 1231. And Black's Law Dictionary specifically notes the definition of "transaction" in the context of the relation back doctrine as "properly embrac[ing] that combination of acts and events, whether in the nature of contract or tort, out of which a legal right springs, or upon which a legal obligation is predicated." *Id.* at 1668; see also *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926) ("'[t]ransaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship").

That the terms' usual meanings were to be given literal application is confirmed by this Court's decision in *Tiller v.*

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2. To illuminate the traditional nature of the "conduct, transaction, or occurrence" test, we quote the fourth edition of *Black's Law Dictionary*, because its publication was roughly contemporaneous with the seminal interpretation of the test in *Tiller v. Atlantic Coast Line R.R. Co.*, 323 U.S. 574 (1945), discussed *infra*.

Atlantic Coast Line R.R. Co., 323 U.S. 574 (1945), which held that a claim will relate back when the original complaint alleges an injury, and the claim in the amended complaint alleges additional causes of that same injury. *Id.* at 581.

In *Tiller*, a widow filed a complaint following the death of her husband in a train accident, seeking relief under the Federal Employers' Liability Act (FELA). She alleged that her husband's employer, the railroad, had failed to provide a proper lookout for her husband, to give him proper warning of the approach of the train, to keep the head car properly lighted, and to warn him of an unprecedented and unexpected change in the manner of shifting cars. After the limitations period expired, she filed an amended complaint alleging that the railroad violated the Federal Boiler Inspection Act (Boiler Act) by failing to have a locomotive properly lighted. Even though the claims were based on different facts -- the FELA claim was based on, among other things, failure to keep the head car properly lighted, and the Boiler Act claim was based on failure to have a different car, the locomotive, properly lighted -- this Court held that the Boiler Act claim related back because both claims "related to the same *general* conduct, transaction, and occurrence which involved the death of the deceased." *Id.* at 581 (emphasis added). "The cause of action now," the Court explained, "as it was in the beginning, is the same -- it is a suit to recover damages for the alleged wrongful death of the deceased. . . . There is no reason to apply a statute of limitations when . . . the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in respondent's yard."[3] *Ibid.*

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3. Decisions of the lower courts confirm that, under *Tiller*'s application of Civil Rule 15(c), claims in amended pleadings, even if based on new facts, will nevertheless relate back if they arise from "events leading up to the same injury"

put at issue in the original pleading. See, *e.g.*, *Miller v. American Heavy Lift Shipping*, 231 F.3d 242, 248-49 (CA6 2000) ("[a]n amendment that alleges added events leading up to the same injury relates back"); *Siegel v. Converters Transp., Inc.*, 714 F.2d 213, 216 (CA2 1983) (per curiam) (amended complaint expanding time period under which shareholder could recover difference between freight rates paid by shipper and those listed by carrier related back to original complaint; "conduct" or "transaction" was not each shipment of goods at issue, but rather "the agreement [by defendants] to violate the tariff"); *Grattan v. Burnett*, 710 F.2d 160, 163 (CA4 1983) (discrimination claim made by two former college officials related back to original claim of arbitrary dismissal; "[b]oth [claims] concern the events leading up to their termination . . ., and in both the termination was the ultimate wrong of which they complained), *aff'd on other grounds*, 468 U.S. 42 (1984); *Rural Fire Protection Co. v. Hepp*, 366 F.2d 355, 361-62 (CA9 1966) (amended complaint sought damages for violations of Fair Labor Standards Act committed at different times than those alleged in original complaint); *Buie v. Woolway*, 2000 U.S. Dist. LEXIS 6183, *9-10 (N.D. Ill. March 24, 2000) ("In this case, as in *Tiller*, the plaintiff is seeking damages flowing from an accident outlined in the original complaint . . .. While the products liability and negligent rental claims are wholly separate from Buie's original negligence claim, they flow from the same root occurrence -- the accident"; "the key to the relation back doctrine is whether the new cause of action arises from the transaction or occurrence featured in the original complaint, not whether the original complaint contains factual allegations sufficient to support a subsequently raised cause of action").

The Warden relies on four circuit cases that look to the facts underlying the specific claims when applying the same conduct, transaction, or occurrence test. Two of those cases are

The Warden misreads *Tiller*, arguing that "the core facts supporting the original claims also supported and provided notice of the new claim -- both related to the proper lighting of the train." Pet. Br. 20. If the Warden were correct, the Court would not have described the "notice" that respondent had had from the beginning as "the *events* leading up to the death of the deceased," *ibid.* (emphasis added), but rather would have said "the improper lighting of the train."

A close reading of *Tiller* also exposes the Warden's error. At the first trial, the district court directed a verdict in favor of the railroad, but this Court reversed. At the second trial, the evidence regarding the movement of the cars was substantially the same as at the first, so this Court's opinion required the district court to submit the case to the jury and *would have* required the court of appeals to affirm the judgment in the plaintiff's favor *if* the plaintiff had rested on her complaint. But because her amended complaint added "a new item of negligence," *id.* at 576 (*viz.*, the locomotive was not properly lighted at the rear, as required by regulations promulgated pursuant to the Boiler Act), the court of appeals felt itself obliged to determine whether there was sufficient

distinguishable because they involved "an entirely new set of actors." See *Percy v. San Francisco General Hosp.*, 841 F.2d 975, 980 (CA9 1988) (the "first amended complaint implicated an entirely new set of actors who are alleged to have injured Percy"); *Nettis v. Levitt*, 241 F.3d 186, 193 (CA2 2001) (sales tax matter, which was subject of amended complaint, involved a dispute between the plaintiff and his employer, "whereas the allegations originally made involved a conflict between" the plaintiff and other individuals). The other two cases are contrary to *Tiller*, which neither case cites nor discusses. See *Moore v. Baker*, 989 F.2d 1129 (CA11 1993); *Fuller v. Marx*, 724 F.2d 717 (CA8 1984).

evidence to justify the submission of the new theory to the jury over the railroad's objection. The court held that there was no evidence that the Boiler Act violation had caused the decedent's death and ruled that a verdict should have been directed for the railroad.

This Court again reversed, holding that "[i]t was for the jury to determine whether the failure to provide this required light *on the rear of the locomotive* proximately contributed to the deceased's death." *Id.* at 578 (emphasis added). *Tiller* was not simply about "the proper lighting of the train," Pet. Br. 20; the amended complaint critically changed the focus of the action by asserting the "new item of negligence" that the locomotive was not lighted at the rear, yet it related back because it arose out of "the events leading up to the death of the deceased in respondent's yard." *Id.* at 581; see also Charles Alan Wright, *The Law of Federal Courts* § 66 (4th ed. 1983) (*Tiller* permitted relation back even though amended claim "was based on a different legal theory than was the original [claim] and rested on facts *not asserted originally*").

B. *Tiller*'s application of Civil Rule 15(c) is consistent with the rule's history and the policy animating it.

Tiller's application of Civil Rule 15(c) is consistent with the rule's history. When the Federal Rules of Civil Procedure were adopted in 1937, the relation back doctrine was already "well recognized." Fed. R. Civ. P.15, Advisory Committee Notes. The doctrine has its roots in former federal equity practice and many state codes, and is codified in Civil Rule 15(c)(2). Equity practice was broader than the strict common law pleading rules, which prohibited an amendment that attempted to introduce a new cause of action (for example, from trespass to trespass on the case, Benjamin J. Shipman, *Common-Law Pleading* § 163 at 294-96 (3d ed. 1923)). Fleming James, Jr., *Civil Procedure* § 6.3 at 159 (1965). By the early 1900's, this Court's broad interpretations of the "cause

of action" standard "widened the scope of permissible amendments in the federal courts as well as the applicability of the relation back doctrine . . .. The practice on the equity side of the federal courts was even more liberal and much of it subsequently was embodied in Rule 15." 6 Charles Alan Wright, Arthur Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1471 at 505 (2d ed. 1990) (hereafter "*Wright & Miller's Federal Practice*"); see *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 68 (1933) (this Court "has fixed the limits of amendment with increasing liberality"); *New York Cent. & Hudson River R. Co v. Kinney*, 260 U.S. 340, 346 (1922) ("we are of opinion that a liberal rule should be applied"). Thus, while virtually all of Civil Rule 15's component parts were drawn from existing practice, see Fed. Eq. R.19, 28 & 34, the "overall effect of [Civil Rule 15] is an amendment policy that is more liberal than that permitted at common law or under the codes." 6 *Wright & Miller's Federal Practice* § 1471 at 505.

While, at the time of the adoption of the Civil Rules, the exact contours of the modern transaction test were still to be developed, three facts about Rule 15(c) were readily apparent. First, the new standard was designed to be more liberal than the common law "same cause of action" test. The modern standard eschewed the "wooden cause-of-action test" for determining the appropriateness of relation back: "No longer [was] a party to be irrevocably bound to the legal or factual theory of his first pleading." 6 *Wright & Miller's Federal Practice* § 1471 at 507.

Second, the new standard furthered the policy of litigating cases on their merits, rather than dismissing them on pleading technicalities, by broadening the right of a party to amend without incurring the bar of the statute of limitations.

Third, and most important for purposes of this case, the new standard anticipated and permitted factual variations, even

substantial ones, in the proof necessary to establish liability under the amended complaint as compared to the original complaint. 6A *Wright & Miller's Federal Practice* § 1497 at 94 ("judicial insistence on notice does not mean that the courts will bar relation back simply because the amended pleading deviates markedly from the original").[4]

Tiller's interpretation of the rule's plain language is not only consistent with its history, it is also consistent with Civil Rule 15's policy "to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities." 6 *Wright & Miller's Federal Practice* § 1471 at 505; see also 3 James Wm. Moore, Daniel R. Coquillette, Gregory P. Joseph, *et al.*, *Moore's Federal Practice* §15.02[1] at 15-9 (3d ed. 2004) (hereafter "*Moore's Federal Practice*") ("[t]he Rule allows for liberal amendment in the interests of resolving cases on the merits"). It also furthers Rule 15(c)'s policy "to ameliorate the effect of the statute of limitations." 6A *Wright & Miller's Federal Practice* § 1497 at 85; 3 *Moore's Federal Practice* § 15.02[2] at 15-10.[5] These policies, in turn, are in keeping with the goal of the civil rules in general, which is "to secure the just, speedy, and inexpensive determination of

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4. *See also* Fleming James, Jr., Geoffrey C. Hazard, Jr., & John Leubsdorf, *Civil Procedure* § 4.23 at 278 (5th ed. 2001) (policies behind limitation period are not threatened by amendments "even when the new ground involves a variation in the facts"); Charles E. Clark, *Handbook of the Law of Code Pleading* § 118 at 731 (2d ed. 1947) ("unless there has been so great a change in the material operative facts that an entirely different fact situation is presented, the amendment should be allowed").

5. The *sole* purpose of the relation back doctrine is to overcome the limitation bar. 6 *Wright & Miller's Federal Practice* § 1496 at 64 n.4.

every action." Fed. R. Civ. P. 1; *Foman v. Davis*, 371 U.S. 178, 181-82 (1962). Indeed, after this Court narrowly construed the language in former Civil Rule 15(c)(3), regarding when an amendment that changes a party relates back, Congress overruled the decision. See Fed. R. Civ. P. 15, Advisory Comm. Notes 1991 Amendment ("[o]n the basis of the text of the former rule, the Court reached a result in *Schiavone v. Fortune*[, 477 U.S. 21 (1986)] that was inconsistent with the liberal pleading practices secured by Rule 8"); *Lundy v. Adamar of New Jersey*, 34 F.3d 1173, 1186 (CA3 1994) (Becker, J., dissenting) ("The fact that the result the Supreme Court reached in *Schiavone* led [Congress] shortly to amend the Rule is a sure reminder of the liberality of federal pleading practices. This liberality is expressed throughout the Rules and is enshrined in a long and distinguished history").[6]

This is not to say that all claims will relate back to the date of the filing of the initial pleading. The claim must arise out of the same "conduct, transaction, or occurrence," so that the responding party will be on notice "that the whole transaction described in [the suit] will be fully sifted, by amendment if need be, and that the form of action or the relief prayed or the law relied on will not be confined to their first statement." *Barthel v. Stamm*, 145 F.2d 487, 491 (CA5 1944) (quoted in 6A *Wright & Miller's Federal Practice* § 1497 at 93). As Justice Holmes explained for a unanimous court, "when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of

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6. In light of this "long and distinguished history" demonstrating the liberality with which the Civil Rules in general and Civil Rule 15(c) in particular are applied, the State *amici*'s contention that "courts and commentators have given Rule 15(c)(2) a relatively narrow scope," Br. of the States 3, should be rejected out of hand.

limitations do not exist, and . . . a liberal rule should be applied." *Kinney*, 260 U.S. at 346; see also *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149 n.3 (1984) ("rationale of Rule 15(c) is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide").

C. The coerced confession claim arose out of the same "conduct, transaction, or occurrence" as the initial application, as that term is traditionally applied in civil contexts, because both challenge the same trial and conviction.

Under a plain reading of Civil Rule 15(c), Mr. Felix's challenge to the trial admission of his coerced confession claim arises from the same "conduct, transaction, or occurrence" as his challenge to the trial court's admission of Kenneth Williams's statement. Because both challenges allege deprivation of constitutional trial rights by the improper admission of extrajudicial statements, the later-filed claim relates back to the date of the timely filed application.[7]

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7. The AEDPA requires only that "an application" for writ of habeas corpus be filed within the one-year limitation period. 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court"). It is undisputed that Mr. Felix complied with the terms of the statute. The Warden has cited no statutory authority for the proposition that each *claim* in the application must be filed within the one-year limitation period. This Court rejected a State's request to apply a portion of the limitation statute the tolling provision in Section 2244(d)(2) on a claim-by-claim basis. *Artuz v. Bennett*, 531 U.S. 4, 9 (2000) ("[b]y construing 'properly filed application' to mean 'application raising claims

The privilege against self-incrimination is a *trial* right. In *Chavez v. Martinez*, 538 U.S. 760 (2003), the plaintiff was interrogated by a police officer, despite the fact that no *Miranda* warnings were given and the plaintiff, who repeatedly asked that the interrogation cease, was in the midst of receiving emergency medical treatment for life-threatening injuries. The plaintiff brought a civil rights action against the officer but, because the plaintiff was never charged with a crime and his statements were accordingly never used against him in any criminal trial, this Court held that the plaintiff was not deprived of his privilege against self-incrimination. Writing for a plurality, Justice Thomas explained that because the coerced statements were not used at a criminal trial, the plaintiff was not "'compelled in any criminal case to be a witness against himself.'" *Id.* at 766 (quoting U.S. Const., amend. V). Under *Martinez*, the operative fact of Mr. Felix's coerced confession claim is that his statements were used against him in his criminal trial.

The confrontation right violated by the admission of Williams's statement is likewise a *trial* right. In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), this Court rejected an interpretation of the Confrontation Clause that would have transformed it into a constitutionally compelled rule of pretrial discovery: "The opinions of this Court show that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." *Id.* at 52 (plurality opn.) (emphasis in original). Under *Ritchie*, the operative fact of Mr. Felix's Confrontation Clause claim is that the statement was admitted during his criminal trial.

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that are not mandatorily procedurally barred,' [the warden] elides the difference between an 'application' and a 'claim'").

When viewed in line with the Court's cases defining the nature of Mr. Felix's claims, both the coerced confession claim and the Confrontation Clause claim arise out of the same conduct, transaction, or occurrence as that phrase is used, and has been consistently applied, in the context of Civil Rule 15(c). They challenge the same conduct -- that of the trial judge -- in admitting the same type of evidence – statements adverse to Mr. Felix -- during the same transaction -- the prosecution's case-in-chief.

The claims are in fact so closely related that they even meet a more restrictive test created by decisions on which the Warden relies. See Pet. Br. 9 n.4.[8] Those decisions hold that a claim will not relate back if it is "totally separate and distinct, 'in both time and type' from those raised in [the] original motion." *United States v. Hicks*, 283 F.3d 380, 388 (CADC 2002) (quoting *United States v. Espinoza-Saenz*, 235 F.3d 501, 505 (CA10 2000)). The claims in this case, however, are not totally separate in both time and type; to the contrary, they

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8. Some courts have created a test that was discarded when the Civil Rules were adopted, under which a claim will relate back "'if and only if . . . the proposed amendment does not seek to add a new claim or to insert a new theory into the case.'" *Woodward v. Williams*, 263 F.3d 1135, 1142 (CA10 2001) (quoting *Espinoza-Saenz*, 235 F.3d at 505)). This is not how Civil Rule 15(c) is used in civil practice. *Ellzey*, 324 F.3d at 525-26 (reading "'conduct, transaction, or occurrence' to refer to single events in a criminal proceeding – an objection to particular evidence, each aspect of a calculation under the Sentencing Guidelines, and so on . . . is not how the phrase . . . is used in civil practice"). Other courts have adopted a test that is contrary to *Tiller*, under which a claim will relate back only if it is based on "the same set of facts" as the timely filed claim, *United States v. Pittman*, 209 F.3d 314, 318 (CA4 2000); *United States v. Duffus*, 174 F.3d 333, 337 (CA3 1999).

arose on successive days during the trial and both challenged the unconstitutional admission of pretrial statements. Thus, even under this restrictive test, the confrontation clause claim relates back to the filing of the coerced confession claim.

The Warden's brief focuses almost exclusively on the Ninth Circuit's "interpretation" of Civil Rule 15(c)(2), rather than its application of the rule to the facts of this case. Pet. Br. 21. She argues that the filing of an initial habeas corpus petition does not put the opposing party on fair notice of "all possible claims" stemming from pre-trial motions, the trial, or sentencing, and the hypothetical examples she poses are far removed from the facts of this case. *Ibid.*[9] But to the extent that the Warden challenges the application of the rule to Mr. Felix's case, her argument suffers from two fundamental defects. First, though she never explains *why* she did not have fair notice of the coerced confession claim, she presumably relies on the fact that the statements of Williams and Mr. Felix were taken about three months apart. Pet. Br. 22. As explained above, however, the operative fact, common to both claims, is that the statements were admitted at Mr. Felix's trial. J.A. 13 (Mr. Felix's "coerced confession claim and Confrontation Clause claim assert that the Constitution was violated by the introduction of his confession and the witness's statements at his trial. Except for the use of these statements at his trial, Felix can state no habeas claim").

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9. As discussed below, the filing of a habeas corpus petition challenging a criminal judgment puts the State on notice of the injury for which redress is being sought -- that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). As *Tiller* makes clear, the State is therefore on notice that all "events leading up to" that injury may serve as a basis for claims in an amended petition. 323 U.S. at 581.

Second, even if the initial petition had not provided adequate notice of the coerced confession claim, the Warden cannot credibly assert that she didn't have notice of the claim, because it was raised in the pretrial motion to suppress filed on the third day of trial and already litigated in state court. Some have suggested, as the Warden implicitly does in this case, Pet. Br. 22, see also Br. for United States 10, that the requisite notice may be provided *only* by the content of the original pleading. See 6A *Wright & Miller's Federal Practice* § 1497 at 91-92. The most oft-cited commentators on the Civil Rules, however, explain that "it is unwise to place undue emphasis on the particular way in which notice is received":

> An approach that better reflects the liberal policy of Rule 15(c) is to determine whether the adverse party, viewed as a reasonably prudent person, ought to have been able to anticipate or should have expected that the character of the originally pleaded claim might be altered or that other aspects of the conduct, transaction, or occurrence set forth in the original pleading might be called into question.

Id. at 93 (citing *Barthel*, 145 F.2d at 491); see also 27A Lawyer's Cooperative Publishing, *Federal Procedure: Lawyers Edition* § 62:336, at 127 (1996) ("notice may . . . be received from outside the pleadings"). In this case, where the pro se petitioner challenged the conduct of the trial judge in admitting unconstitutional evidence in the prosecution's case-in-chief, a reasonably prudent warden ought to have been able to anticipate that subsequently appointed habeas counsel would challenge another aspect of the trial judge's conduct that was in fact previously contested, *viz.*, the admission of the coerced confession.

For all these reasons, Mr. Felix's coerced confession claim relates back to the filing of the initial petition under a

traditional application of Civil Rule 15(c).

II.

The Plain Language of 28 U.S.C. § 2242 Requires That Civil Rule 15(c) Be Applied in Habeas Proceedings As It Is In Other Civil Actions, and Renders Irrelevant the Warden's Policy-Based Arguments.

Because the traditional application of Civil Rule 15(c) would allow Mr. Felix's coerced confession claim to relate back to the filing of the initial petition, the Warden is forced to argue that the rule must be applied differently in habeas proceedings, in other words, that the AEDPA worked an implied repeal of Section 2242. She relies for this argument on Civil Rule 81(a)(2) and Habeas Rule 11, which provide that the Civil Rules apply in habeas corpus proceedings to the extent they are not inconsistent with the statutes concerning habeas corpus or the Habeas Rules. Pet. Br. 8-10. But the typical operation of Rule 15(c), as applied to the facts of this case by the circuit court, is not inconsistent with either the statutes concerning habeas corpus or the Habeas Rules. To the contrary, the statutes expressly provide that habeas corpus petitions may be amended as provided for in Civil Rule 15, 28 U.S.C. § 2242, and no Habeas Rule speaks to the issue of amendment. Most importantly, nothing in the AEDPA, outside the provisions of Chapter 154 governing procedures for condemned inmates in certain States, is inconsistent with Section 2242 or Civil Rule 15(c).

The Warden also raises several policy-based arguments, contending that Civil Rule 15(c) should not be applied in a way that undermines "the purposes" of the AEDPA statute of limitations. Pet. Br. 8. But when the language of a statute is as plain and unambiguous as that used in Section 2242 is, policy

arguments are beside the point. *Bennett*, 531 U.S. at 10 ("[w]hatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them"). Moreover, as we demonstrate *infra*, Congress's policy objectives are fully satisfied by the elimination of delay-causing amendments in certain capital habeas corpus cases, 28 U.S.C. § 2266(b)(3)(B), and, as Judge Easterbrook has explained, by the ample power that Civil Rule 15(a) vests in the district courts to curtail delays in non-capital cases. *Ellzey*, 324 F.3d at 527.

A. Section 2242 requires that Civil Rule 15(c) be applied in habeas proceedings as it is in other civil actions.

Section 2242 of title 28, United States Code, enacted in 1948, provides that an "[a]pplication for a writ of habeas corpus . . . may be amended or supplemented *as provided in the rules of procedure applicable to civil actions*." 28 U.S.C. § 2242 (emphasis added).[10] The only Civil Rule that addresses the amendment of pleadings, and thus the only rule to which Section 2242 refers, is Civil Rule 15. Every circuit to have considered the issue has held that Civil Rule 15(c) applies to habeas corpus proceedings. *Newell v. Hanks*, 283 F.3d 827, 835 (CA7 2002) (citing cases). While the AEDPA significantly amended a number of the original habeas provisions, it left Section 2242 unchanged.[11] For the Warden to prevail, she must

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10. When Congress passed the Act of June 25, 1948, it codified existing habeas practices and did not intend to make substantive changes thereto. See H.R. Rep. No. 308, 80th Cong., 1st Sess. A177-78 (1947).

11. The Rules Enabling Act, 28 U.S.C. § 2072, under which a federal statute governing procedure is displaced by a subsequently adopted rule on the subject, does not change the

demonstrate that Congress, which surely knew in 1996 of Civil Rule 15(c)'s "long and distinguished history," impliedly repealed Section 2242 with the passage of the AEDPA. See *Felker v. Turpin*, 518 U.S. 651, 660 (1996) ("[r]epeals by implication are not favored"). This she cannot to do. For "[i]t is not a function of this Court to presume that 'Congress was unaware of what it accomplished.'" *Albernaz v. United States*, 450 U.S. 333, 342 (1981) (quoting *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

Moreover, the text of the AEDPA precludes the Warden's argument. The text demonstrates that when Congress wished to change the rule for amending habeas petitions, it did so explicitly in a limited, precisely defined category of cases. Chapter 154 of the AEDPA, which contains special optional provisions for death penalty cases, includes a provision whereby Congress strictly limited the ability of capital petitioners to amend their federal habeas corpus petitions.[12]

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analysis. Because the amendment of habeas pleadings is addressed by the third paragraph of Section 2242 and is not covered by the Habeas Rules, under Civil Rule 81(a)(2) and Habeas Rule 11 the statute controls, unlike the first two paragraphs of Section 2242, which were supplanted by the later-enacted Habeas Rules. Compare 28 U.S.C. § 2242 ¶3 (concerning amendments, which subject is not covered by Habeas Rules), with 28 U.S.C. § 2242 ¶¶1, 2 (concerning form of application, which is covered and supplanted by Habeas Rule 2(a)-(d)).

12. Much of the Congressional concern motivating passage of the AEDPA focused on delays in federal habeas litigation in capital cases. See, *e.g.*, H.R. Conf. Rep. 104-518, 94th Cong. 2d Sess. 111 (1996) (AEDPA "incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in

Section 2266(b)(3)(B) provides that "[n]o amendment to an application for a writ of habeas corpus *under this chapter* shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b)," (emphasis added), which sets forth the standard for filing a second or successive petition. In light of Congress's specific limitation in Section 2266(b)(3)(B) on the right of capital habeas petitioners in "opt-in" States to file amendments to their petitions, the Warden cannot credibly argue that Congress also intended to limit the right of non-capital habeas petitioners (or capital petitioners in non opt-in states) to amend their petitions but left it to the courts to infer that intent. See *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (in the absence of "irreconcilable" statutes, courts may not find implicit repeal unless there is "some affirmative showing of [congressional] intention"). *Calderon v. Ashmus*, 523 U.S. 740, 750 (1998) (Breyer, J., concurring) ("Federal Rule of Civil Procedure 15's liberal standard for amendment applies to habeas petitions in states not eligible for Chapter 154").[13]

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capital cases"); 141 Cong. Rec. S4591 (daily ed. Mar. 24, 1995) (statement of Sen. Spector); *id.* at S4596 (statement of Sen. Hatch); *id.* at S7486 (daily ed. May 25, 1995) (statement of Sen. Biden); *id.* at S7488 (statement of Sen. Thurmond); *id.* at S7610 (daily ed. May 26, 1995) (statement of Sen. Burns); *id.* at S 7657 (daily ed. June 5, 1995) (statement of Sen. Dole); *id. at* S7662 (statement of Sen. Feinstein); *id.* at S 7666 (statement of Sen. Inhofe).

13. See also *Lindh v. Murphy*, 521 U.S. 320, 327-28 (1997) (negative implication of Section 107(c) of AEPDA was that the Act's changes to Chapter 153 generally applied only to cases filed after the Act's enactment); *Duncan v. Walker*, 533 U.S. 167, 172-73 (2001) (fact that Congress expressly mentioned "Federal" review in Chapter 154 provision but did not in Chapter 153 provision is "strong evidence" that it did not

B. The traditional application of Civil Rule 15(c) is consonant with the AEDPA limitation period.

Statutes of limitation are designed to promote justice by preventing surprises through the revival of stale claims. *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348 (1944). The AEDPA limitation period is animated by the same design. "'The one-year period of limitations contained in the AEDPA is a statute of limitations like any other statute of limitations in a civil proceeding.'" *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804, 815 (CA2 2000) (quoting *United States v. Thomas*, 221 F.3d 430, 434 (CA3 2000)).[14] The relation back doctrine is consonant with

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intend to include federal habeas petitions within the scope of 28 U.S.C. § 2244(d)(2), the statutory tolling provision); cf., *Whitfield v. United States*, 125 S. Ct. 687, 692 (2005) ("Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so").

Amicus curiae Criminal Justice Legal Foundation writes that "[a]lthough the AEDPA did not change the law making the rules of civil procedure govern amendments to habeas petitions, see 28 U.S.C. § 2242, this law and Rule 15(c)(2) now operate in the very different world of the AEDPA." CJLF Br. 19. The short answer is that if Congress had indeed intended to create so different a world for non-capital petitioners and capital petitioners in non opt-in States post-AEDPA, it would have done in Chapter 153 what it did in Chapter 154, *i.e.*, expressly say so.

14. For the same reason, courts have held the AEDPA limitation period not to be jurisdictional in nature, see, *e.g.*, *Griffin v. Rogers*, ___ F.3d ___, 2005 U.S. App. LEXIS 3570,

this design because, while it allows new claims to be added to on-going litigation, the requirement that those claims arise from the same conduct, transactions, or occurrence as set forth in the initial pleading ensures that the responding party has been provided adequate notice. *Kinney*, 260 U.S. at 346 ("when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist"); see also *Baldwin County*, 466 U.S. at 149 n.3; *Fama*, 235 F.3d at 815 ("the seeming inconsistency [between the AEDPA limitation period and Civil Rule 15(c)] is one of appearance alone").

The Warden contends that because the AEDPA statute of limitations protects the finality of state court judgments, it should be applied with a special vigor -- so special, in fact, that it should trump the words of the statute itself, which provide that amendments should be permitted in the traditional manner in which relation back has been applied for more than three-quarters of a century. Pet. Br. 7; see also *id.* at 9; ("Ninth Circuit's so-called 'literal' application of Rule 15(c)(2) to habeas proceedings . . . runs afoul of the principles which inform habeas corpus practice by undermining the limitation period and effectively rewriting the tolling provision").[15] But the

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*11 (CA6 March 3, 2005), and to be subject to equitable tolling. *Ibid.*

15. One of the Warden's *amici*, the Criminal Justice Legal Foundation, is even more forthright in arguing that because the AEDPA statute of limitations protects the finality of convictions rather than promotes the provision of fair notice, which it admits is the goal of civil limitation periods in general, the traditional test for relation back purposes should be eschewed in favor of a "comparatively restrictive reading of Rule 15(c)(2) in the context of habeas corpus." CJLF Br. 21.

finality of a state court judgment is already put into question whenever a timely habeas corpus petition is filed in federal court, so the effect of allowing an amendment does not appreciably affect the state's interest in finality. The Warden's fear that these marginal costs may be significant because the circuit court's rule permits habeas petitioners to do an "end run" around the statute of limitations and render it ineffective is, as discussed below, unfounded.[16]

C. The district courts are vested with ample power to prevent abuses.

The Warden contends that if Mr. Felix prevails, petitioners will have the right to assert claims on habeas "years after direct review has ended." Pet. Br. 11. For the reasons discussed below, prisoners like Mr. Felix who are serving a non-capital sentence have powerful incentives to litigate their habeas applications expeditiously. See *Rose v. Lundy*, 455 U.S. 509, 520 (1982) ("the prisoner's principal interest . . . is in obtaining speedy federal relief"); *Walker*, 533 U.S. at 191 (Breyer, J., dissenting) ("prisoners not under a sentence of death (the vast majority of habeas petitioners) have no incentive to delay adjudication of their claims").[17] To the extent that

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16. Although the data is somewhat dated, it suggests that the marginal delay associated with the addition of a claim for relief is relatively minor. See, *e.g.*, United States Department of Justice, Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 24 (1995) (the mean processing time for habeas applications by state prisoners sentenced to a term of years that raised one issue was 211 days, compared to 270 days for applications raising two issues).

17. There's certainly been no undue delay in this case. Mr. Felix's initial federal petition was filed only nine months

delay in capital cases was caused by liberal amendment of applications, the AEDPA specifically addressed that concern in Section 2266(b)(3)(B). See also 28 U.S.C. § 2266(b)(1)(C)(i) (requiring district courts to render decision within 210 days after application is filed).

Pursuant to Civil Rule 15(a), after a responsive pleading has been filed, a prisoner may amend the petition only by leave of court or the written consent of the adverse party. Fed. R. Civ. P. 15(a). While leave is to be freely given "when justice so requires," *ibid.*; *cf.* 28 U.S.C. § 2243 (the court shall dispose of the habeas application "as law and justice require"), there are a number of reasons, which this Court set forth in an illustrative list, why a district court might exercise its discretion to deny leave to amend: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Foman*, 371 U.S. at 181. We know of no reason, and the Warden has certainly not made the case, why district courts should not be trusted to exercise carefully their discretion in permitting amendments to avoid prejudice to the State which, after all, is the primary purpose behind the statute of limitations.

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after his conviction became final, well within the one-year limitation period. His amended petition was filed eight months thereafter. The Warden complains that the amendment and exhaustion process "delayed the filing of an answer" to the petition. Pet. Br. 15 & n.7 (noting that the exhaustion process took over three-and-one-half months). But Mr. Felix's requests for extensions of time to file the amended petition and to continue the hearing date on the Warden's motion to dismiss were all unopposed by the Warden. Pet. App. H4-6. Relief, not delay, is Mr. Felix's objective.

As Judge Easterbrook concluded, the fact that the AEDPA is designed to expedite resolution of collateral attacks "should influence the exercise of discretion under Rule 15(a) -- which gives the district judge the right to disapprove proposed amendments that would unduly prolong or complicate the case -- rather than lead to a special reading of Rule 15(c)(2)." *Ellzey*, 324 F.3d at 526.

The laws and rules governing habeas proceedings also provide significant disincentives against delay. First, if a prisoner files a "placeholder petition,"[18] it will most likely be dismissed pursuant to Habeas Rule 4, which provides that if it plainly appears from the petition that the petitioner is not entitled to relief, the district court "must" dismiss the petition. See *O'Blasney v. Solem*, 774 F.2d 925, 926 (CA8 1985). Second, the significant hurdle that must be surmounted to avoid dismissal of a claim in a second or successive petition, see 28 U.S.C. § 2244(b)(2), stands as a powerful incentive to assert all claims as early as possible.

Third, the court might find that a new claim is procedurally defaulted, see *Wainwright v. Sykes*, 433 U.S. 72 (1977), or unexhausted, see *Rose*, 455 U.S. at 519, and deny the petition before a responsive pleading is

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18. The term was coined by Judge Easterbrook to describe a "skeletal document" that broadly states a ground for relief, such as ineffective assistance of counsel at sentencing, but which supplies neither factual detail nor legal elaboration. The purpose of filing such a petition is simply to satisfy the limitation period, with the plan of filing "a real petition" later. *Ellzey*, 324 F.3d at 523. A placeholder petition violates Habeas Rule 2(c)(2), which requires a petition to state the facts supporting each ground for relief. Like most of the Warden's policy concerns, this one is irrelevant to this case because Mr. Felix's was not a placeholder petition.

even filed. See 28 U.S.C. § 2254(b)(2) (application may be denied on the merits "notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"). Fourth, the procedural rules of States other than California will generally preclude amendments involving claims that have not been already been fully exhausted in the state courts. See *Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Carey v. Saffold*, 536 U.S. 214, 219 (2002).

The Warden asserts that the circuit court's rule permits a habeas petitioner who has filed a timely federal petition to unduly delay federal habeas proceedings by bouncing back and forth between state and federal courts, repeatedly exhausting "newly developed claims," and amending the federal petition to add the "new claims." Pet. Br. 14 ("there is no statutory limit to the number of times this can be done").[19] A similar argument was raised by the warden in *Slack v. McDaniel*, 529 U.S. 473 (2000), who argued that "a new meaning" be given to "the established term" "second or successive" lest petitioners, following exhaustion, be able to "return to federal court but again file a mixed petition, causing the process to repeat itself." 529 U.S. at 489. Intimating that such vexatious tactics were unlikely, the Court squarely rejected the argument. "To the extent the tactic would become a problem . . . it can be countered without upsetting the established meaning of a second or successive petition." *Id.* at 489-90.

Accordingly, even if the policy concerns raised by the Warden here were valid and relevant to the facts of this case, they would not justify disregarding the plain language of Civil Rule 15(c) and Section 2242.

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19. Again, this policy concern of the Warden is not presented by the facts of this case; Mr. Felix's coerced confession claim was not a "new" or a "newly developed" claim, nor did he return more than once to the state courts.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the lower court.

Respectfully submitted,

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